IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1637

EXECUTIVE AERO, INC., a Minnesota corporation,
Petitioner,

vs.

BAACT CORPORATION, a Pennsylvania corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondent BAACT Corporation respectfully presents this brief in opposition to the petition of Executive Aero, Inc. for a writ of certiorari to review the opinion and judgment of the Minnesota Supreme Court affirming the opinion and judgment of the Minnesota District Court.

INTRODUCTION

In accordance with Rules 24 and 40 of the Rules of this Court, BAACT accepts the petitioner's recital of the opinions delivered by the courts of Minnesota. However, BAACT is dissatisfied with petitioner's formulation of the questions presented, and with petitioner's incomplete statement of the case. Therefore BAACT submits its revisions and supplements to the Court.

ISSUE PRESENTED

Can a stranger to a bankruptcy proceeding collaterally attack a judicial sale of all the bankrupt's assets when such sale was confirmed by the bankruptcy referee and consummated by a Court ordered receiver's bili of sale?

STATEMENT OF THE CASE

Prior state court proceedings: Various plaintiffs commenced an action in the District Court of the State of Minnesota against Executive Aero, Inc. (the petitioner herein), and against Mooney Aircraft, Inc. (Mooney) to recover damages for personal injuries, property damage and death, arising out of a 1965 airplane crash in the State of Wisconsin. The matter was tried to a jury in the State of Minnesota in 1967, and resulted in judgments against Executive Aero and Mooney in the total amount of $160,345.00. The case was submitted under the theory of comparative negligence, and the jury found Executive Aero 55% causally negligent, and Mooney 45% causally negligent. On appeal taken to the Minnesota State Supreme Court by Executive Aero[1] the Court concluded[2] that "there was ample evidence" to support the jury's finding of negligence against both defendants.[3]

Mooney owned real property in Texas and Executive Aero's insurer, the Ohio Casualty Insurance Company, retained Texas counsel to bring suit upon the Minnesota

[1]Mooney did not join in this earlier appeal.

[2]The Court's opinion is reported in *Tayam v. Executive Aero, Inc.*, 283 Minn. 48, 166 N.W.2d 584 (1969).

[3]It should be noted that in the current Court proceeding, in addition to the issues raised in Executive Aero's petition, the Minnesota State Supreme Court affirmed the trial court's finding that the jury's 1967 allocations of negligence were res judicata as regards the rights of contributions between the parties. (A-5). *BAACT Corp. v. Executive Aero, Inc.*, 251 N.W.2d 107, 109 (Minn. 1977).

aircraft crash judgments. The resulting Texas judgments were entered of record in June of 1968. These Texas judgments established a "valid lien" on Mooney's Texas property.

Bankruptcy proceedings: In 1969 Mooney commenced voluntary bankruptcy proceedings in the United States District Court, Western District of Texas. The judgments which traced back to the aircraft crash action were scheduled, along with nearly $5,000,000.00 of other secured interests on "Schedule A-2, Creditors Holding Securities."

On February 18, 1969, prior to the first meeting of creditors, American Electronic Laboratories, Inc. (AEL), the predecessor in interest of respondent BAACT, extended a purchase offer for all of the Mooney assets to the receiver in bankruptcy. The offer, which included the assumption and payment of nearly $5,000,000.00 worth of valid liens and priority claims, and an additional $650,000.00 in cash, was communicated to some 7,000 creditors, shareholders and other persons holding possible claims against the bankrupt's estate. Under the terms of the purchase offer, AEL was to receive clear title to all of Mooney's assets subject only to "valid liens" against those assets as defined in the purchase offer.

The first meeting of creditors was held on March 13, 1969. At the Court's request, the receiver reported the offer by AEL and a second offer by another corporation. An adversary hearing was held, and after extensive discussion, the AEL offer was amended by increasing the cash component $200,000.00 to a total of $850,000.00 cash. Among other items, the purchase offer was specifically amended to remove a cause of action against the former president of the bankrupt company by stating that the

claim was "not included in the 'business and assets' sold hereunder." The Court received a recommendation from the receiver to accept the AEL offer. The Court then announced that it would recess to the next day, at which time it would hear anyone who could show cause why the offer by AEL should not be accepted.

On March 14, 1969, further adversary hearings were held. After having considered all the evidence, including the receiver's report, and all other information and testimony, the Court found that the assets of the bankrupt had been duly appraised in accordance with competent and available means of appraisal, and that the appraisal showed that the assets were of a value less than the secured debts against the estates if sold at auction and other than as a going business, that the aircraft industry and all persons who would be reasonably expected to be interested in purchasing the bankrupt estates as a going business had had a reasonable opportunity to investigate the value of the bankrupt estates, that AEL could withdraw its offer if not accepted at the time and had indicated that it would consider doing so, that the sale to AEL appeared to make it possible for the bankrupt estates to pay all priority claims and expenses and have some assets available for dividends to unsecured creditors, and further it was the only assurance before the Court that the business which employed some 700 people would continue, and that the offer appeared from all available evidence to be reasonable in amount.

Accordingly the referee ordered that the offer of AEL be accepted and offer of the competing corporation be rejected. The Court's Order specifically required the receiver to execute all documents and to do all things necessary to

convey legal title and to deliver the assets of the bankrupt's estates to AEL "in accordance with the terms of the purchase offer" which was attached to the order and made a part of it "for all purposes."

Pursuant to the Order the receiver executed a bill of sale conveying to AEL all personal property, including all personal property within the description of the "business and assets" in the purchase offer. Business and assets had been defined in the purchase offer to include:

> 1.(b) "Business and Assets": * * * choses in action and claims (whether or not contingent, liquidated or unliquidated, and including, but not limited to, tax refunds and claims, other refunds, deposits and causes of action of every nature), * * * and all other properties and assets (real, personal, mixed, tangible and intangible) owned by, or due to, the Companies or the Receiver or the Trustee, whether or not described in any provision of this Purchase Offer and whether or not included in the bankruptcy schedules filed by the Companies and whether existing on the date of this Purchase Offer or created hereafter.

Current state court proceedings: Because Executive Aero made no payment to the original aircraft crash plaintiffs, the entire judgment lien remained unsatisfied. AEL discharged the lien in question by paying the aircraft crash plaintiffs $144,310.00, an amount $72,155.25 in excess of the liability of Mooney as apportioned by the jury in the State Court trial. Shortly after the payment by AEL, Executive Aero, *taking full credit for the AEL payment,* paid the remaining 10% balance to the judgment creditors.

By assignment BAACT Corporation (respondent herein) became the owner of all of AEL's interests in the Mooney assets. BAACT commenced this action to recover contribution. At trial, the Minnesota District Court found for BAACT, holding that (1) Mooney had possessed an inchoate claim for contribution from Executive Aero when it went into bankruptcy; (2) that AEL's payment of $72,-155.25 in excess of Mooney's fair share of the aircraft crash judgments had the effect of "ripening" Mooney's claim for contribution; and (3) that BAACT was the owner of Mooney's contribution claim against Executive Aero by virtue of the bankruptcy sale. The Minnesota Supreme Court affirmed the trial court's finding that the record, which had included the receiver's bill of sale, bankruptcy schedules, documents transferring assets from AEL to BAACT, and the final Order of the bankruptcy court, showed that BAACT had met its burden of proof in establishing its right to contribution. The Minnesota Supreme Court held:

> "BAACT established it holds a chose in action which is prima facie valid; that the chose in action was duly assigned to it; and that the chain of title dates back to the judicial sale of the bankruptcy court. Executive Aero is estopped from collaterally attacking the integrity of that judicial order and decree. A decree of a bankruptcy court which confirms a sale by the trustee is not subject to collateral attack. See, 9 Am. Jur. 2d Bankruptcy, §1217; 8A C.J.S. Bankruptcy, §325. A confirmed sale in bankruptcy confers full legal and equitable title upon the purchaser. 4A Collier, Bankruptcy §70.98[18].
>
> "The trial court is affirmed in all respects."
>
> 251 N.W.2d 107, 109 (Minn. 1977).

ARGUMENT

PETITIONER MAY NOT COLLATERALLY ATTACK THE VALIDITY OF A CONFIRMED JUDICIAL SALE IN BANKRUPTCY.

Respondent established its ownership of a chose in action for contribution. This claim for contribution resulted from the payment of $72,000.00 in excess of Mooney's fair share of the liability for the 1965 aircraft crash. The evidence presented to the Minnesota courts included bankruptcy schedules, the final order of the bankruptcy court, a copy of the purchase offer which was specifically incorporated into the Court's Order confirming the sale of the Mooney assets, and the receiver's bill of sale transferring choses in action to AEL, the predecessor in interest of the respondent, BAACT.

Petitioner has not challenged the sufficiency of this evidence to establish BAACT's claim for contribution. Rather, petitioner asserts that because of what Executive Aero claims to be irregularities in the bankruptcy proceeding, the receiver could not sell this claim. This position is not only incorrect, but is an impermissible collateral attack upon the judicial order and decree of the bankruptcy court. Professor Moore in 4A Collier, Bankruptcy, paragraph 70.98[18], p. 1195 et seq. "Effects of the Sale" states:

> "A confirmed sale in bankruptcy, together with the conveyance which the trustee is obliged to execute under Rule 606(b)(4) superseding §70g, generally confers full legal and equitable title upon the purchaser. The purchaser who complied with the terms of the contract will not be affected by, and will be protected against, any attempt to oust him or resell the same property to another. The validity of the sale

is not open to inquiry or impeachment in any collateral proceeding in either a state or federal court. * * *

"The rights and *quantum* of property acquired by the purchaser depend primarily on the terms of the sale as ordered or agreed upon."

A bankruptcy court is an equity court with broad powers to sell all the property of a bankrupt's estate. General Order in Bankruptcy 18 (now Bankruptcy Rule 606) specifically provided that:

"Upon application to the Court, and for good cause shown, the receiver or trustee may be authorized *to sell the property of the estate* or any specified portion thereof at private sale".

Here there was application to the court. There was good cause shown. The 7,000 creditors and shareholders of the bankrupt had been notified of the purchase offer of AEL which would enable the sale of the assets of the bankrupt as a going business and provide for the payment of nearly $5,000,000.00 in valid liens. Contested hearings were held on two separate days. The purchase offer went into great detail to specify that AEL was to purchase all of the assets; there is not a hint of a wish on the part of the receiver or the referee to sell anything less (except the specific claim against the former officer). The bill of sale specifically transferred the bankrupt's "business and assets" which had been defined to include:

"1.(b) * * * choses in action and claims (whether or not contingent, liquidated or unliquidated, . . .), * * * owned by, or due to, the Companies or the

Receiver or the Trustee, whether or not described in any provision of this Purchase Offer and whether or not included in the bankruptcy schedules filed by the Companies and whether existing on the date of this Purchase Offer or created hereafter."

As intended by the parties to the judicial sale, and as found by both the District and Supreme Courts of the State of Minnesota, title to the chose in action was transferred to AEL by the judicial sale of the bankruptcy court.

PETITIONER'S CASES DISTINGUISHED

Petitioner's cases do not support the proposition that a collateral attack may be made upon the order of a bankruptcy court confirming the sale of the bankrupt's assets. The cases cited by the petitioner: *In re Insulation and Acoustical Specialties,* 311 F. Supp. 1209 (W.D. Mo., W.D. 1969); *In re Layton,* 221 F. Supp. 667 (D. Ariz. 1963); and *In re Butler Candy Co., Inc.,* 8 F. 2d 311 (W.D. Penn. 1925), are cases of direct review from the order of the referee to the Federal District Court.

Petitioner has cited no cases for its proposition that a receiver in bankruptcy, cannot, in a private sale of all the bankrupt's assets, convey title without being subject to collateral attack for the obvious reason that there are no such decisions. For its proposition, however, Executive Aero does cite from an orphan decision of an inferior court, *Appling v. Minarets & Western Ry. Co.,* 100 Cal. App. 621, 280 Pac. 1029 (District Court of Appeal, First District, Division 2, Calif. 1929). A review of the opinion in *Appling* reveals that neither the order directing the private sale, nor the order confirming the trustee's sale made any specific reference to choses in action. As noted, in the Moo-

ney bankruptcy, choses of action were specifically mentioned and transferred to AEL. Unlike the BAACT action in which respondent established its title, *Appling* is further distinguished by the fact that the plaintiff had presented insufficient evidence to establish his claim. Indeed the *Appling* opinion concluded:

> "We are of the opinion that the plaintiff, having failed to prove his ownership of the cause of action, the court was right in granting the motion for a nonsuit." 100 Cal. App. at 629, 280 Pac. at 1033.

By the time of the Mooney bankruptcy, General Order in Bankruptcy 18 had been amended to provide for the private sale of the "property of the estate," whereas it formerly provided only for private sale of any "specific portion" thereof. Accordingly the *Appling* case is of no validity under General Order 18 as it existed at the time of the judicial sale of the Mooney assets. Probably the *Appling* case was never of any validity as it was in conflict with the case of *In re Nevada-Utah Mines & Smelters Corporation*, 202 Fed. 126, 128 (CCA, 2d Cir. 1913) which held:

> [2] Bankruptcy Act, §2 (7) invests the District Court with jurisdiction to "cause the estate of bankrupts to be collected, reduced to money and distributed, * * *" and (15) "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Section 70 (b) provides that sales shall when practicable be subject to the approval of the court. Section 30 gives the Supreme Court power to prescribe all necessary orders as to procedure and for carrying the act into force and effect. Of course, it was not intended that

> the Supreme Court by such orders should control or alter the law. General Order 18 (89 Fed. viii, 32 C.C.A. xx) provides that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specific portion of a bankrupt's estate at private sale." The two bids which were accepted by the trustee did cover specific portions of the estate and together covered all the assets. Therefore there was a technical compliance with the literal language of the act. *However, we do not think that the Supreme Court could have intended or was authorized by section 30 of the act to cut down the statutory power of the District Court to collect the estate by selling the whole of it at private sale if it thought it best to do so.*[4] (Emphasis supplied.)

BAACT's evidence established that the Mooney receiver collected the whole of the bankrupt's estate and sold it all to AEL at private sale. That judicial sale is not subject to collateral attack by Executive Aero.

As BAACT established its ownership of the chose in action, and established that it paid more than its fair share

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[4]It is of interest to note that the decision in *In re Nevada-Utah Mines & Smelters Corp.* is consistent with modern practice under both Bankruptcy Rule 606(b)(1) and Rule 606(b)(2), which is described by the Advisory Committee's Note as "an adaptation of General Order 18." Rule 606 provides:

> *(b) Conduct of Sale.*
>
> *(1) Court Approval.* The property of the estate shall be sold subject to the approval of the court unless the court orders otherwise.
>
> *(2) Public or Private Sale.* All sales shall be by public auction, unless otherwise ordered by the court on application to the court and for good cause shown. Unless it is impracticable, there shall be filed with the court on completion of a sale an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk. If the property is sold by an auctioneer, he shall file the statement and furnish a copy to the trustee or receiver; otherwise the trustee or receiver shall file the statement.

of the aircraft crash judgment, the Minnesota courts' award of contribution was correct.

CONCLUSION

Certiorari to the Supreme Court of the State of Minnesota should be denied.

Respectfully submitted,

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